

DECISION**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D. C. 20548

FILE: B-184518

DATE: September 14, 1976

MATTER OF: Ackco, Inc.

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98041**DIGEST:**

Where one of four evaluators disqualified herself from evaluating protester's proposal because of potential conflict of interest, agency should have disqualified her from evaluating remaining proposals. However, protester's allegations of bias, impropriety and unfair treatment by agency evaluators are not supported by record.

Two protests have been received by this Office from Ackco, Inc. (Ackco) regarding two contract awards by the Department of Health, Education, and Welfare (HEW). In both cases, the essence of Ackco's protest is that HEW evaluators conducted their technical evaluations of Ackco's proposals upon information which was inaccurate, prejudicial and hearsay in character, did not adequately investigate the basis of such unfavorable information and that the proposal evaluations were accomplished with the purpose of not awarding a contract to Ackco.

Because they involve the same protester, the same agency and a number of similar grounds for protest, both cases have been consolidated for purposes of this decision.

RFP 75-69 was issued by the Office of Education (OE), HEW on April 16, 1975 for proposals to develop a "media kit" for the Indian Parent Committees under the Indian Education Act of 1972, Title IV. The RFP proposed a cost type contract and provided that the proposals would be evaluated on the basis of technical factors and costs. The proposal's soundness, originality and clarity were to be of first importance, then personnel qualifications and lastly corporate experience in related studies.

Offers were received from seven organizations, three of which were determined to be unacceptable. At this point, Ackco was evaluated as second highest with a score of 85.66 and the ultimate awardee, XYZYX Information Corp. (XYZYX), was rated fourth highest with a score of 81.25. While the score of XYZYX represented the average of the four evaluators, the score of Ackco represented the average of only three since one of the evaluators disqualified herself from evaluating Ackco because she had a relative on the executive staff of that firm.

Negotiations with the four offerors remaining in the competitive range were conducted, each being asked to respond in its best and final offer to certain points which the evaluators believed needed clarification or improvement. The best and final offers were received and the technical proposals as amended were evaluated. The technical proposal of XYZYX was recommended for award by three of the four evaluators. The fourth evaluator again disqualified herself from rating Ackco's proposal.

Ackco contends that the disqualification of one of the evaluators from rating its proposal while rating the proposals of its competitors adversely affected the interests of Ackco. HEW states that this evaluator was retained on the panel because she was the only evaluator who had lived most of her early life on an Indian reservation. In any event, our review of the record indicates that, in this instance, the interests of Ackco do not appear to have been prejudiced. Ackco was included in the competitive range and we note that the evaluator in question gave the identical final numerical rating to the three remaining offerors within the competitive range and the other evaluators were unanimous in their final selection of XYZYX. However, we do have reservations about the practice of permitting an evaluator who believes there is conflict of interest with regard to one offeror to participate in the deliberations and to rate the other proposals. Such action is inconsistent in that the evaluator potentially could influence the selection by indirect action. Moreover, assuming without deciding that a conflict existed in this case, such action invites suspicion from the disappointed offerors. We suggest that HEW take steps to avoid such situations from arising again.

Ackco also contends that it was not notified about the nine day extension in the proposal due date granted by Amendment No. 1 to the RFP. HEW's comments to this Office point out that every offeror was notified of the extension as part of the RFP package. Although HEW states that the date of the amendment is the same as the date of the RFP, we note that the amendment does not bear an effective date but was signed by the contracting officer five days after issuance of the RFP. In any event, Ackco never complained as to the sufficiency of the time allowed for preparing its proposal and, as noted by HEW, Ackco was permitted to revise its proposal during negotiations.

Ackco's remaining objections concerning the procurement under RFP 75-69 are identical to certain objections raised in connection with the second protested procurement considered in this decision and we therefore will consolidate our consideration of those points.

RFP 166-75-HEW-OS was issued by the Office of the Secretary, (OS), HEW and called for cost based proposals to prepare, develop and conduct 30 "Management by Objectives" (MBO) training programs for the Office of Native American Programs (ONAP). The RFP provided for an 18 month program and stated that award would be made to that firm whose proposal was most advantageous to the Government, price and other factors considered. The evaluation criteria allocated 40 points to the technical proposal, 30 points to the qualifications and composition of the staff and 30 points to the qualifications and experience of the firm.

Twenty-two offerors submitted timely proposals and the evaluation panel found 19 of them unacceptable. Two proposals were found to be "potentially" acceptable and the Ackco proposal was determined to be "conditionally" acceptable. These three proposals and one other unacceptable proposal were determined to be within the competitive range, that is, they were either acceptable or capable of being made acceptable through negotiations. Negotiations were conducted with the four offerors each of whom was given written questions and comments reflecting agency concerns about its proposal. The best and final offers were received and the evaluation panel determined that Ackco's final offer and one other were unacceptable.

A contract was awarded to the Center for Human Systems (CHS) for \$424,259 and all other offerors were immediately notified. Ackco protested to this Office.

The relevant prices and proposal scores for Ackco and CHS were as follows:

<u>Firm</u>	<u>Original</u>		<u>Revised</u>	
	<u>Score</u>	<u>Est. Cost</u>	<u>Score</u>	<u>Est. Cost After Negotiation</u>
Ackco	69	\$435,162	46	\$427,408
CHS	91	459,651	90	425,259

Ackco asserts that the criteria and instructions given by OS to the evaluation panel favored non-Indian firms intending to hire Indian staff with experience in Native American Programs over Indian firms such as Ackco proposing to hire non-Indian MBO consultants. In our opinion, this assertion is unfounded. Our review

of the criteria and instructions indicates a strong preference for a staff which is knowledgeable of Native American Programs and in MBO training, but reveals no bias against Indian firms. Indeed, the fact that Ackco had senior Indian professionals on its staff was listed as a strength of its proposal while its weaknesses in actual MBO experience was a concern of the evaluators. Further, the regular staff of CHS included Indian membership.

In connection with both procurements, Ackco believes that the evaluators for each of its proposals were prejudiced against it. Ackco refers to a previous contract with the Small Business Administration (SBA) which was administered by OE and funded by OE and the Bureau of Indian Affairs (BIA) of the Department of the Interior. Ackco completed the contract by delivering a report which was officially accepted by OE. But Ackco contends that the report was critical of the OE and the BIA and made controversial recommendations. Ackco believes that this caused inaccurate and prejudicial criticism to be circulated among the agencies of the Government and adversely affected its professional reputation with the evaluators of the two proposals involved here. Further, Ackco contends that an OE summary of the report attributed to Ackco certain recommendations which did not fully and adequately represent Ackco's views and did not properly credit the firm with the overall responsibility for the project.

The record fails to reveal, and Ackco has offered no proof, that any of the evaluators were unfavorably influenced by the substance of Ackco's report under the previous contract. Moreover, there is no evidence that any of the evaluators regarded the firm's performance under the prior SBA contract as unfavorable or that the evaluators failed to leave to the contracting officer's discretion all matters concerning the quality of the previous performance. The record of RFP 75-69 shows that a number of evaluators expressed concern as to the lack of Ackco's prior experience in developing media materials and does not reflect a negative reaction to the firm's prior contract report. Similarly, there is no indication of such a reaction in the evaluation of proposals under RFP 166-75-HEW-0S. Rather, it appears that Ackco's technical approach and methodology was rated so low that it would not have been selected even if it had been given perfect scores under the remaining criteria (Staff Qualifications/Experience and Organization Qualifications/Experience). Ackco's assertions that some of the evaluators were employees of the Office

B-184518

of Indian Education, that some served on both evaluation panels and that some reported to common superiors are without merit as proof of prejudice or that Ackco was treated unfairly by them. The fact that Ackco was initially rated acceptable in both procurements and that the downgrading of its initial scores was due to what the evaluators believed to be inadequate answers to their questions during the oral and written discussions also tends to lessen the credibility of the prejudice contention.

Ackco makes other allegations that special responsibility standards were imposed on Ackco but not on its competitors. However, our review indicates there is no evidence that special requirements were so imposed or that any criterion was unequally applied. The selection of the contractors for these procurements was made primarily on the basis of the merits of the technical proposals rather than the firm's responsibility.

In the absence of any evidence of bias, we see nothing intrinsically wrong with staff members of the OE serving on panels evaluating proposals concerning Indian education or with one of the evaluators serving on panels for both procurements. Moreover, we find no basis for objecting to the fact that some of the evaluators may have been aware of the Ackco report resulting from its previous contract, in the absence of evidence that any of them let his or her opinion of it unfairly influence the evaluation of the proposals involved here.

In our opinion, Ackco has failed to support its allegations of bad faith and unfair treatment by HEW with anything beyond conjecture, statements of suspicion, and inferences which our review of the records of these procurements indicates are unfounded.

For the reasons set forth above, both protests and demands for bid preparation costs are denied.

Deputy


Comptroller General
of the United States